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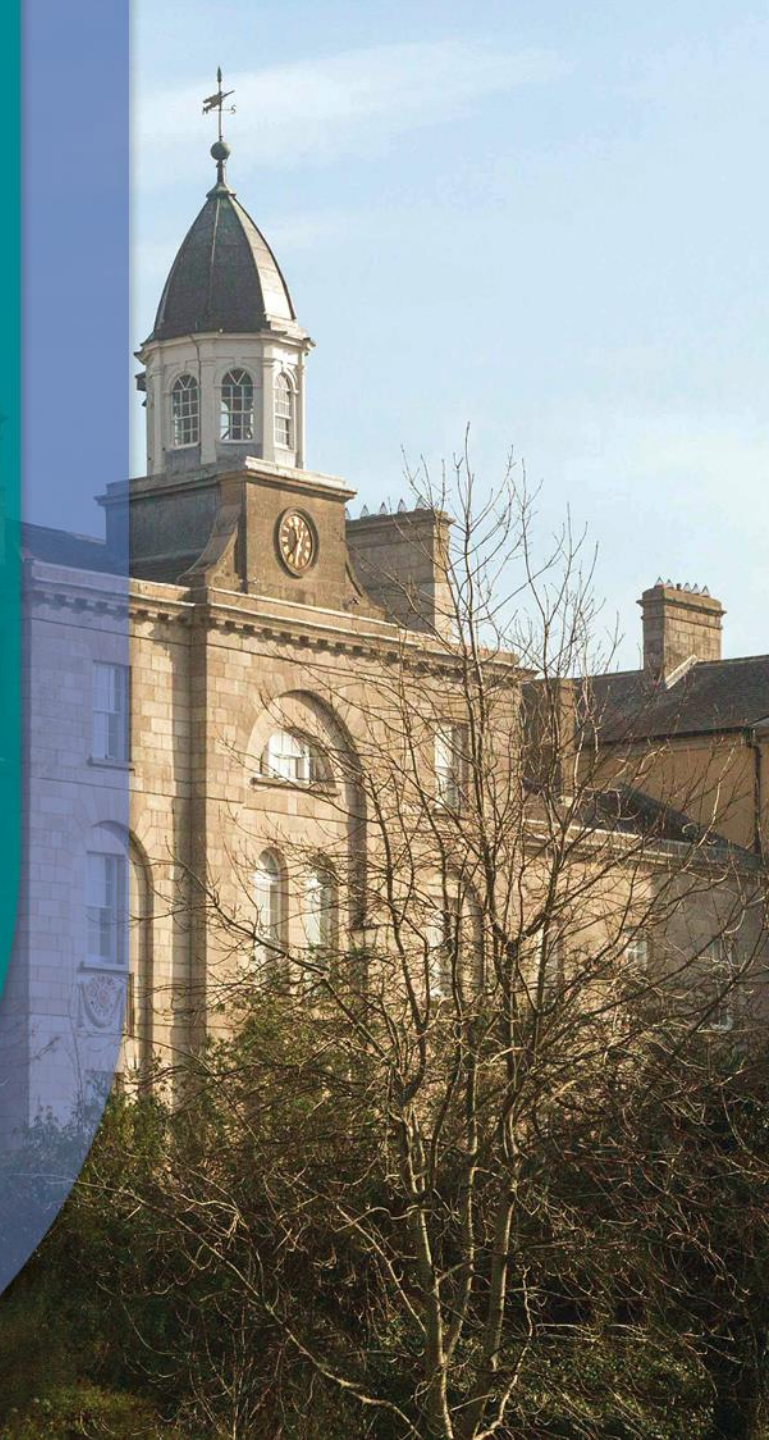
Stiúrthóra Ionchúiseamh Poiblí
Director of Public Prosecutions

Corporate Offending – A Prosecutor’s Perspective

Henry Matthews

Special Financial Crime Unit

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“... an Irish FBI for white-collar crime”



The mission of the ODPP is to deliver a fair, independent and effective prosecution service ...



The mission of the CEA is to improve the compliance environment for corporate activity in the Irish economy.

The mission of the FBI is to protect the American people and uphold the Constitution of the United States.

Criminal or Regulatory



Category 1 - Companies Act 2014

- **Section 286 Accounting records – offences committed under sections 281-285**
- **Section 722 fraudulent trading**

Commonly prosecuted - non Category 1 Offences.

- **Other CL offences, theft and fraud offences, money laundering, conspiracy to defraud...**

Corporate Liability Offences Requiring Mens Rea

See - Tesco Supermarkets Limited v. Nattrass [1972] A.C. 153

“... it is extremely difficult to convict a company of an offence because the prosecution has to show that the controlling minds of the company — somebody at the board level — were complicit in the criminality you are trying to prove.

... anyone will agree that if you’re looking into allegations of corporate misconduct spookily the e-mail trail tends to dry up at a fairly junior level.”

David Green, former Director Serious Fraud Office (SFO)

<http://www.acfe.com/article.aspx?id=4294980221>

Criminal Justice (Corruption Offences) Act 2018



18. (1) A body corporate shall be guilty of an offence under this subsection if an offence under this Act is committed by—

(a) a director, manager, secretary or other officer of the body corporate, (b) a person purporting to act in that capacity, (c) a shadow director within the meaning of the Companies Act 2014 of the body corporate, or (d) an employee, agent or subsidiary of the body corporate,

with the intention of obtaining or retaining—

(i) business for the body corporate, or

(ii) an advantage in the conduct of business for the body corporate.

(2) In proceedings for an offence under *subsection (1)*, it shall be a defence for a body corporate against which such proceedings are brought to prove that it took **all reasonable steps and exercised all due diligence** to avoid the commission of the offence.

Criminal Justice (Theft and Fraud Offences) Act 2001 as amended



- 42B.—(1) Where a relevant offence is **committed for the benefit of a body corporate** by a relevant person and the commission of the relevant offence is attributable to the failure, by a director, manager, secretary or other officer of the body corporate, or a person purporting to act in that capacity, to exercise, at the time of the commission of the relevant offence and in all the circumstances of the case, the **requisite degree of supervision or control** of the relevant person, the body corporate shall be guilty of an offence.

- See also section 38A

Prosecutor's Perspective on Compliance (DOJ USA)



While the details underlying the Guidelines' essential components have morphed over ... the core of the Guidelines has remained the same. The core framework of the Guidelines continue to revolve around three (3) essential questions—

- Is the corporation's compliance program well designed?
- Is the program being applied earnestly and in good faith?
- Does the corporation's compliance program work in practice?

Simple neglect?

“Under Irish company law, company directors are conferred with significant legal duties and obligations.” ... “In that context, acting responsibly includes keeping oneself informed about the affairs of the company. A person who takes little, if any, active role in the management of a company, or for example, acts merely as a post box or as a signatory of company documents is likely to encounter potentially significant difficulties in satisfying a court that they have acted responsibly.”

Irish Independent 19 July 2023

Decisions! Decisions!

- **Criminal Law Act 1997 – Section 7.—(1) Any person who aids, abets, counsels or procures the commission of an indictable offence shall be liable to be indicted, tried and punished as a principal offender.**

Or

- **Consent and connivance etc.**

Criminal Justice (Theft and Fraud Offences) Act 2001 as amended



- 58.—(1) Where—
 - (a) an offence under this Act (other than *Part 5* or *6*) has been committed by a body corporate, and
 - (b) the offence is proved to have been committed with the consent or connivance of, or to have been attributable to **any neglect** on the part of, a person who was either—
 - (i) a director, manager, secretary or other officer of the body corporate, or
 - (ii) a person purporting to act in any such capacity
-
- NB ‘Any neglect’ in sections 38A and 42B

Part 7 - Criminal Justice Act 2006



- **76.—** (1) Where an offence under this Part or the offence of conspiracy to murder under section 4 of the Act of 1861 is committed by a body corporate and is proved to have been committed with the consent, connivance or approval of, or to have been attributable to any **wilful neglect** on the part of, any person, being a director, **manager**, secretary or any other officer of the body corporate or a person who was purporting to act in any such capacity, that person, as well as the body corporate, shall be guilty of an offence and shall be liable to be proceeded against and punished as if he or she were guilty of the first-mentioned offence.

What is a manager?

DPP v TN [2020] IESC 26 – McKechnie J.

The individual's authority to make relevant decisions should be considered. The court should have regard to whether he or she is the person responsible for putting relevant procedures and policies in place, or similarly whether such task is performed by staff under his/her direction and control and in respect of which he/she has the final word. The person's role in the hierarchical chain may be important: the more senior, the more likely to be he or she is to come within the meaning of "manager" as used in the section. However, **if he or she has no true authority for that aspect of company's affairs, and does no more than report to a more senior member on his activities of overseeing staff in implementing the policies devised higher up the chain, that would tend to suggest that he does not have the level of responsibility required.**

- See also DPP v Hegarty [2011] IESC 32

No need to prosecute the company

Immunity - The Process

Stages where application not part of Cartel Immunity Programme (CIP):

- **Initiating contact**
- **Application for Immunity**
- **Assessment**
- **Negotiation**
- **Conditional Grant of Immunity**
- **Evidence**
- **Final Grant of Immunity**

N.B. Ongoing Assessment. Revocation if conditions are not met.

Immunity Witnesses Considerations

Applied to individual circumstances of each case



- **Credibility and Reliability**
- **Role of Applicant**
- **Seriousness of the Offence**
- **Significance of Evidence**
- **Full Disclosure – admission of wrongdoing**
- **General Public Interest Considerations**

See also Chapter 14.6 of DPP's Published Guidelines 2019 edition

Forfeiture and Confiscation



- **Confiscation Orders see section 9 of the Criminal Justice Act 1994**
- **Section 8F of the Criminal Justice Act 1994 (see S.I. No. 540/2017 - European Union (Freezing and Confiscation of Instrumentalities and Proceeds of Crime) Regulations 2017)**
- **Forfeiture Orders see section 61 of the Criminal Justice Act 1994**
- **Cash Seizures see section 38/39 of the Criminal Justice Act 1994**

NB: There are other measures

Compensating the Victim

- **Restitution Order s.56 Criminal Justice (Theft and Fraud Offences) Act, 2001**
- **Compensation Order: s.6 Criminal Justice Act 1993**
- **Proceedings under The Police (Property) Act 1897**

- **See also section 61(7) Criminal Justice Act 1994.**



Thank you